U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 22Mar2002

CASE NO. 2001-INA-93

In the Matter of:

ALLAN N. LOWY
Employer

On Behalf of:

ELSA MARINA PEREZ
Alien

Appearance: Aron Hasson, Esquire
For the Employer

Certifying Officer: Martin Rios[1]
San Francisco, CA

Before: Holmes, Vittone, and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the

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[1]Although Mr. Rios issued the Final Determination in this case (AF 18), we note that Pandora L. Wong had issued the Notice of Findings in this matter (AF 47).

Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On May 24, 1996, the Employer, Allan N. Lowy, filed an application for labor certification to enable the Alien, Elsa Marina Perez, to fill the position of "Cook/Kosher," which was re-classified by the Job Service as "Cook, Domestic" (AF 52). The job duties for the position, as stated on the application, are as follows:

> Plans menus, cooks and serves meals according to tastes or recipes of family. Orders food stuffs, cleans kitchen and cooking utensils. Prepares specialty meals and uses ingredients in accordance with the dietary concerns of the family relating to health, nutrition and kosher dietary rules. Kosher dietary rules includes (sic) discerning which foods are kosher and which are non-kosher, and which foods may or may not be served with other foods. The kosher dietary rules also follow specific cleaning procedures.

(AF 52, Section 13).

The primary stated job requirement for the position is: 2 years of experience in the job offered (AF 52, Section 14). Furthermore, "Other Special Requirements" for the position are as follows: Must have experience with kosher cooking and Jewish holidays and festivals in order to prepare appropriate foods which correspond to the holidays and festivals." (AF 52, Section 15).

The CO issued a Notice of Findings ("NOF") on September 28, 2000 (AF 47-50), in which she proposed to deny certification on the grounds that the job opportunity did not appear to be a bona fide one which is open to U.S. workers, in violation of §656.20(c)(8). The Employer submitted his

rebuttal on or about October 30, 2000 (AF 20-46). A different CO found the rebuttal unpersuasive, and issued a Final Determination, dated January 11, 2001, denying certification on the grounds that the Employer had not convincingly shown his ability to pay the Alien the prevailing wage on a permanent, full-time basis; thus, there is no true job opening to which U.S. workers could be referred (AF 18-19). On February 9, 2001, the Employer appealed the Final Determination (AF 1-17), and the CO forwarded this matter to the Board of Alien Labor Certification Appeals.

Discussion

In the NOF (AF 47-50), the first CO set forth the following regulatory basis, finding, and corrective action.

> Regulatory Basis: 20 CFR 656.20(c)(8) requires that "the job opportunity has been and is clearly open to any qualified U.S. worker." This regulation is interpreted to mean that the job opportunity must be bona fide and that the job opening as described on Form ETA750A actually exists.
>
> Finding: Your application contains insufficient information to determine whether the position of Domestic Cook actually exists in you (sic) household or whether the job has been created solely for the purpose of qualifying the alien as a skilled worker under current immigration law. Under the immigration law, the number of immigrant visas available to "unskilled workers" (aliens granted labor certification in occupations requiring less than two years of experience) is very limited.
>
> The visa waiting period for these workers is very lengthy and makes immigrant visas virtually unavailable for unskilled workers. There is no current waiting period for most immigrant visas in the "skilled worker" category. According to the Directory of Occupational Titles [DOT], almost all household positions are classified as unskilled; the occupation of Domestic Cook is an exception.
>
> Corrective Action: Submit rebuttal explaining why this position should be considered a bona fide job opportunity rather than a job opportunity that was created solely for the purpose of qualifying the alien as a skilled worker. Your rebuttal evidence **at a minimum** must include documentation consisting of data to support each of your assertions and must include:
>
> 1) the number of meals prepared daily and weekly, the length of time required to prepare the meals, the number of people for whom such meals are prepared;
> 2) the work and/or school schedules of all persons for whom such meals are prepared;
> 3) if entertainment is a basis of your claim, you must describe in detail the frequency of household entertaining in the 12 calendar month period immediately preceding the filing

of the application (list dates of the entertainment, number of guests, number of meals served, etc. and the extent to which the Domestic Cook is involved in preparing food for guests);
4) if pre-school and school aged children live in the household: (a) how will your child(ren) be cared for when both parents are absent from the home and the alien is fully engaged in preparing meals (b) who will care for your child(ren) during the alien's scheduled time off? And (c) will the alien be required to perform functions such as child care, general cleaning or other non-cooking functions? (If not, how are those functions accomplished in the household?);
5) what percentage of the employer's disposable income will be devoted to paying the alien's salary? (Your answer must be supported by providing a copy of your Federal income tax return for the immediately preceding calendar year);
6) if there are other domestic workers employed in the household, list all positions and corresponding weekly hours of employment; and
7) it appears the alien has worked for you for many years, yet there is no evidence you paid her--please submit **documentation** you have employer (sic) her on a full-time basis.

Your responses, documentary evidence and all other relevant factors and circumstances will be evaluated in the totality to determine whether the position of Domestic Cook actually exists in your household. Merely answering all the questions does not ensure approval of the application.

(AF 48-49).[2]

We find that the essence of the CO's concern, as expressed in the NOF, is that the Employer may be attempting to improve the Alien's chances of qualifying for a visa, as a "skilled worker," by classifying the position as "Domestic Cook," rather than one of the many "unskilled" household positions, such as a "General House Worker" or a "Child Monitor."[3] Based upon that underlying premise, the CO questioned whether there is a bona fide job opportunity that is clearly open to any qualified U.S. workers, as provided in §656.20(c)(8).

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[2]The "Kosher" cooking requirement is not an issue herein, because the CO never raised it. Furthermore, it appears the Job Service may have accepted the Employer's justification for the requirement (AF 55). *Cf.*, *Martin Kaplan*, 2000-INA-23 (July 2, 2001)(*en banc*).

[3]The Specific Vocation Preparation (SVP) for Domestic Cook (DOT 305.281.010) is "6," which represents experience of "Over 1 year up to and including 2 years." On the other hand, positions such as General House Worker (DOT 301.474-010) and/or Child Monitor (DOT 301.677-010) have an SVP of "3," and require experience of "Over 1 month up to and including 3 months."

In his rebuttal, the Employer addressed the questions posed in correspondence, dated October 30, 2000 (AF 20-22), and submitted appropriate documentation, including copies of the Alien's W-2 forms showing the wages she received from Employer, social security taxes withheld, and medicare taxes withheld for the years 1997, 1998, and 1999 (AF 23-25); the Employer's "Quarterly Report of Wages and Withholdings for Employers and Household Workers" form showing the Alien's income for the quarter ending March 31, 2000 (AF 28); and, Employer's 1999 Federal income tax returns (AF 30-46).

In the Final Determination, the new CO stated, in pertinent part:

> All rebuttal documentation has been taken into consideration, however, you, the employer, failed to satisfactorily rebut all of the findings of September 28. Therefore, your petition for alien labor certification is denied for the following reasons:
>
> JOB OPENING?
> Domestic Cook
>
> NOF questioned your ability to pay the prevailing wage on a permanent, full-time basis. You rebut that the prevailing wage would consume 40% of your income and that for the past three years you have employed the alien at slightly more than half of the prevailing wage.
>
> The evidence does not convincingly show your ability to pay the alien the prevailing wage on a permanent, full-time basis, meaning there is no true job offer to which U.S. workers can be referred. This petition cannot be certified.

(AF 19).

On appeal, the Employer stated that the CO had "misread" his tax return, and that although his adjustable gross income may only be $48,468.00, many of the deductions are non-cash adjustments which are used to lower his tax liability. In addition, the Employer submitted various other documentation showing additional income, such as $58,336 from the Allan Lowy's Children Trust as shown on the 1999 Federal Tax returns for estates and trusts, and other liquid assets of nearly $47,000 in various accounts. Furthermore, the Employer submitted copies of additional W-2 forms for the Alien in the years 1995 and 2000 (AF 1-17).

Having carefully considered the entire record, we find that the Employer's opportunity to rebut was denied by the change of emphasis shown on the NOF and Final Determination, respectively. Although the underlying issue remained the same - *i.e.*, Is there a bona fide job opportunity that is clearly open to qualified U.S. workers - the NOF focused on the nature of the job, while the Final Determination cited the Employer's alleged inability to pay the prevailing wage rate on a full-time basis.

In summary, the essence of the cited deficiency, as raised in the NOF, was whether the job opportunity was a bona fide *domestic cook* position, or whether the Employer had mis-characterized the job, in order to provide the Alien with an advantage in applying for a visa. For the purposes of that determination, this case should have been analyzed under the "totality of the circumstances" test adopted by the Board in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*). However, in the Final Determination, the new CO shifted the focus to the question of whether the Employer has the wherewithal to pay the prevailing wage rate.

Assuming that the CO found that the Employer met the "totality of the circumstances" test, the new CO should have issued a second NOF and given the Employer an opportunity to address the "ability to pay" issue more directly. The new evidence, such as the trust income, is technically not before us because it is evidence which was first submitted with the request for review. *See, e.g., Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992); *Kelper International Corp.*, 1990-INA-191 (May 20, 1991). However, the Employer's failure to submit such evidence on rebuttal was largely due to the CO's failure to clarify the issue in the NOF. Therefore, the Employer was not given a full opportunity to address the issue. Accordingly, unless the previously submitted evidence clearly establishes grounds for reversal, this matter should be remanded to the CO for further consideration. *See, e.g., Dr. Mary Zumot*, 1989-INA-35 (Nov. 4, 1991); *Peter Hsieh*, 1988-INA-540 (Nov. 30, 1989).

Based upon our review of the previously submitted evidence, it is not clear whether the Employer has shown his ability to pay the prevailing wage on a permanent, full-time basis. In so finding, we note that the Employer paid the Alien annual wages of $14,076.88, $14,077.00, and $14,077.00 in 1997, 1998, and 1999, respectively (AF 23-25). Furthermore, the quarterly withholdings form ending on March 31, 2000 revealed wages of $3,900 (AF 26). If annualized, this represents wages of $15,600.00 in 2000. The prevailing wage for the job offer, however, is $12.80 per hour. Based upon a 40-hour week, the annual wage is $26,624.00. The Employer's personal tax returns reveal an adjusted gross income of $48,468 (AF 30). Thus, the Alien's annual wages are almost 55% of the Employer's adjusted gross income. On the other hand, the Employer's Schedule C reveals gross income of $144,674 (AF 34). This suggests that at least some of the Employer's $83,787 in "total expenses" may be non-cash outlays which are relevant for tax purposes only (AF 34). However, in the absence of clear documentation that the Employer has the ability to pay the prevailing wage on a permanent, full-time basis, we find that this case must be remanded to the CO. On remand, the CO should provide the Employer an opportunity to fully explain his tax returns and to submit additional evidence regarding this issue.

In view of all of the foregoing, this matter must be remanded.

Vittone, Chief Judge, Concurring.

I concur in the remand in this case so that the Certifying Officer may consider whether the "totality of the circumstances" changes his analysis of whether this case presents a *bona fide* job opportunity. Certainly the new evidence of trust income changes the equation considerably from the record considered by the CO at the time of the Final Determination.

I write separately, however, to clarify several points. First, although the *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), decision requires an analysis of the totality of the circumstances, some circumstances may have more influence on the credibility of the *bona fides* of a case than others. Undoubtedly, the financial ability of Employer to pay an employee to do nothing but cook is one of the most important factors, and, in my view, may in some cases be sufficient evidence of the lack of *bona fides* of a domestic cook application to outweigh any countervailing evidence. In the instant case, even assuming that Employer's actual disposable income as illustrated by his tax return was higher than the CO believed due to "noncash" adjustments to income, that amount is only about $10,000 more than the amount the CO based his decision on – not necessarily enough of a change to bring a different result in this case.[4]

This case may very well turn on whether the evidence of trust fund income – submitted only after the issuance of the Final Determination -- should be part of the record for consideration by the CO. I disagree with the majority that the NOF caused Employer's failure to submit a full rebuttal.

It is true that the Notice of Findings might be read as implying that submission of an income tax return would be sufficient to constitute rebuttal. In context, however, I cannot agree that the NOF gave the type of misleading instruction found to require a remand in *Miaofu Cao*, 1994-INA-53 (Mar. 14, 1996)(*en banc*) [5]. Here, it was clear that the CO was challenging whether Employer had a *bona fide*

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[4] The majority opinion suggests that Employer had potentially over $88,000 that could have been non-cash outlays that may have been available to pay a cook. However, Employer's argument only drew attention to capital losses, Schedule E losses and an IRA contribution – not to its deductions on Schedule C "Profit or Loss from Business" where most of the deductions from income are shown as business expenses. Such expenses presumably would not have been available to pay a domestic cook.

[5] In *Cao*, the Board made it clear that an NOF must not mislead an employer into the belief that submission of one type of requested documentation would be sufficient rebuttal whereas the CO was in fact looking for something more. As the Board in *Carlos Uy*, wrote, however:

> The NOF is not required ... to be a detailed guide on how to achieve labor certification. *Miaofu Cao*, 94-INA-53 (Mar. 14, 1996) (*en banc*). Moreover, the burden of proving that

position for a domestic cook rather than a housekeeper or other domestic work with cooking duties, and that one of the items the CO would be looking to is whether Employer had the financial wherewithal to afford the luxury of an employee who does nothing but cook. Thus, I find that Employer was on notice of the issue and that any reasonable reading of the NOF would lead one to conclude that the CO was requiring, at minimum, a copy of Employer's tax return to document that financial ability. As noted above, on its face Employer's individual tax return does not show such disposable income – regardless of whether the CO's or Employer's interpretation is employed – to indicate that ability to pay a cook would not be a concern. Employer – who is an attorney and should understand the need to perfect a record sufficient to establish the eligibility for a benefit – should have recognized this deficiency and put on its evidence of additional income at the time of the rebuttal.

I concur in the remand, however, because the CO only discussed income in the Final Determination. Although Employer's income as shown on his income tax return (and not considering the later submitted evidence), whether viewed as the amount the CO used or Employer's interpretation, would throw into considerable doubt a willingness to pay someone about 1/2 the household's disposable income to cook, in an absolute sense, the household did technically have enough money to pay the salary. Moreover, there are a few indicia in the case suggesting that the job may be *bona fide*, such as prior employment of the Alien as a cook (assuming that the Alien was – in fact – performing as a professional domestic cook and not merely as a general household worker whose duties include cooking). Thus, the CO should have weighed the evidence rather than only considering the household income. As noted above, the lack of sufficient income may be the single most important factor and outweigh the other evidence of record – but under a section 656.20(c)(8) citation it must be weighed.[6]

> the employer is offering a *bona fide* job opportunity, and specifically that he or she is offering full-time employment, is on the employer. *Gerata Systems America, Inc.*, 88-INA-344 (Dec. 16, 1988) (*en banc*); 20 C.F.R. § 656.2(b). Under the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued.

Although the CO in the instant case only required submission of a tax return, it was clear in context that the CO was investigating how much disposable income was available to pay the cook's salary to assist in gauging the *bona fides* of the position. I do not interpret the demand for a tax return as indicating that mere submission of a return would establish this part of the rebuttal.

[6]It is important to observe, however, that financial ability to pay is a possible separate issue under the regulation at 20 C.F.R. § 656.20(c)(1). This regulation, however, was not cited as a violation by the CO. If the CO had determined that this regulation needed to be cited as a violation following the submission of the rebuttal evidence, a new NOF would have been necessary. As the case progressed in the instant case, however, I disagree with the majority opinion that a second NOF was required to discuss further Employer's financial circumstances in this section 656.20(c)(8). The CO did not raise a

Although this may seem like a technicality, it is important insofar as it documents whether the CO took any special circumstances of the household into consideration that might outweigh the financial burden of employing a professional domestic cook.

In view of this technical analytical error by the CO, a remand is necessary. Moreover, in view of the fact that the Board disfavors technical denials, it would be unjust to limit Employer on remand to the evidence submitted in the rebuttal. *J. Michael & Patricia Solar*, 1988-INA-56 (Apr. 6, 1989) (en banc). Thus, on remand, the CO should consider the new evidence of trust fund income.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this case is **REMANDED** for further proceedings in accordance with this decision.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

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new violation, but rather was merely discussing an element of the totality of the circumstances test. My fault with the CO's Final Determination was not that it raised a new issue, but that it did not establish that the CO had looked at the whole record.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.